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DNA TO PLAY: MAJOR LEAGUE BASEBALL'S USE OF DNA TESTING ON CENTRAL AND SOUTH AMERICAN PROSPECTS IN THE AGE OF THE GENETIC INFORMATION NONDISCRIMINATION ACT OF 2008

Nicholas Pompeo[†]

INTRODUCTION

As a society, we will have to ask if we can in fact collect information that reveals these individual differences and still continue to treat all individuals the same. We may wish to consider some people, by virtue of their gene-based handicaps or predispositions, to have greater (or lesser) claims on us for support (especially if that support is limited to job opportunity and health coverage).¹

In the wake of the human genome project, Marc A. Lappé warns society of the privacy issues at stake arising from the potential misuse of genetic information. Echoing Lappé's assertions, many bioethicists and legislators have expressed concerns regarding the use of genetic information in employment and insurance decisions. In response to these concerns, the federal government enacted the Genetic Information Nondiscrimination Act of 2008 (GINA), which aimed to prevent genetic discrimination by employers and health insurers. The law became effective for health insurers in May of 2009, and for employ-

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¹ Marc A. Lappé, *Justice and the Limitations of Genetic Knowledge*, in JUSTICE AND THE HUMAN GENOME PROJECT 153, 162 (Timothy F. Murphy & Marc A. Lappé eds., 1994) (explaining the moral and social challenges society faces because of the amount of information that will be available upon completion of the human genome project).

ers on November 21, 2009.² GINA prohibits employers and insurance companies from discriminating on the basis of genetic information and from requiring genetic testing as a condition for employment or receiving an insurance policy.³ Much of the fear surrounding the use of genetic information in the realm of employment revolves around the use of “arguably *relevant*” information concerning someone’s employment.⁴ The question is whether companies should be privy to genetic information when making their employment decisions. GINA resoundingly answers: no.

However, how should society treat employers using genetic information in employment decisions, not in order to discriminate, but instead to prevent identity fraud? Such a situation has arisen in the context of Major League Baseball and the recruitment of prospects from Latin American countries.⁵ In order to combat a growing identity fraud problem involving prospects from Latin America, Major League Baseball has been performing DNA tests and bone-scans on potential players to determine their age and identity.⁶ This testing raises concerns, not only over the use of the information provided, but also over the legality of the testing under GINA.⁷

This Note argues that the legitimate purpose pursued by Major League Baseball in ending the identity fraud problem should justify DNA testing despite GINA’s general mandate. Congress should add provisions to GINA to allow Major League Baseball to use genetic information to combat their problem of identity fraud. To minimize the temptation that individual teams and Major League Baseball might feel to misuse or misappropriate the genetic information gained from the testing, Major League Baseball should prevent individual teams from testing by centralizing the testing within its Department of Investigations and limiting access to the test results. Furthermore, Major

² DEP’T OF HEALTH AND HUMAN SERVS., “GINA”: THE GENETIC INFORMATION NONDISCRIMINATION ACT OF 2008: INFORMATION FOR RESEARCHERS AND HEALTH CARE PROFESSIONALS (2009); Eric N. Miller, *The Genetic Information Nondiscrimination Act of 2008*, SP003 ALI-ABA 2013, 2017 (2008) (providing a general background on the passage of the Act).

³ See The Genetic Information Nondiscrimination Act of 2008, Pub. L. 110-233, § 201-02, 122 Stat. 881 (codified at 42 U.S.C. § 2000ff).

⁴ Pauline T. Kim, *Genetic Discrimination, Genetic Privacy: Rethinking Employee Protections for a Brave New Workplace*, 96 NW. U. L. REV. 1497, 1500 (2002).

⁵ See Michael S. Schmidt & Alan Schwarz, *Baseball’s Use of DNA Tests on Prospects Finds Controversy, Too*, N.Y. TIMES, July 22, 2009, at A1 (discussing Major League Baseball’s recent revelation that teams and the league have been conducting DNA tests on prospects from Latin American countries to determine identity).

⁶ *Id.*

⁷ *Id.*

League Baseball should take actions that will reduce the need for genetic testing in the future.

Section I of this Note provides background on the actual need for genetic testing in Major League Baseball and the problem of identity fraud. It examines the relationship between Major League Baseball and Latin American countries, in particular the Dominican Republic. It also tracks the progression of the problem from some of the early cases that first revealed fraud to cases of genetic testing and the results that have been achieved by this testing. Section II analyzes concerns regarding genetic testing that led to the enactment of GINA. Also, it examines the provisions of Title II of the Act, which addresses employment discrimination and analyzes their applicability to Major League Baseball's genetic testing.⁸ This section delves into international law because of the international nature of Major League Baseball's activities. It focuses on mandates from inter-governmental organizations like the United Nations and a brief examination of discrimination under the Dominican Republic's Labor Code. In Section III, this Note examines ethical considerations that Major League Baseball should take into account as it continues to employ genetic testing as a means to fight identity fraud. This section also proposes safeguards that Major League Baseball should implement to avoid the temptation to use the genetic information to determine traits "*relevant*" to employment within Major League Baseball.⁹ Finally, in Section IV, the Note concludes that Congress should amend GINA to allow Major League Baseball to use genetic information to prevent identity fraud when there is a demonstrated discrepancy in a prospective player's initial background check.

I. MAJOR LEAGUE BASEBALL'S USE OF GENETIC TESTING TO DETERMINE THE IDENTITY OF PROSPECTS

Although Major League Baseball's use of genetic testing is a recent solution to the identity fraud problem,¹⁰ the problem itself has been occurring for at least a decade.¹¹ To understand the current situa-

⁸ Genetic Information Nondiscrimination Act of 2008 §§ 201-213.

⁹ See Kim, *supra* note 4.

¹⁰ See Jesse Sanchez, *MLB, Clubs Using DNA Tests on Prospects: Players Being Analyzed to Determine Age, Identity*, MLB.COM (July 22, 2009), http://mlb.mlb.com/news/article.jsp?ymd=20090722&content_id=5993474&vkey=news_ (explaining that while teams have conducted genetic tests on prospects for a few years, Major League Baseball only began testing in 2009).

¹¹ See *Tejada Admits to Being Two Years Older Than He Had Said*, ESPN.COM (Apr. 18, 2008), <http://sports.espn.go.com/mlb/news/story?id=3351418>

tion, one must understand the dynamics of the relationship between Major League Baseball and the young prospects coming out of Latin American countries. The two factors that are most important for understanding the identity fraud problem are the recruiting process of Latin American players¹² and the profit motive for these young players.¹³ The fraud that is now prevalent in Major League Baseball, however, has spread even to Little League Baseball.¹⁴ In an effort to curb this problem, Major League Baseball has implemented its Investigations Department to perform DNA and other genetic tests on prospects to determine their identity.¹⁵ In this section, I examine the factors that have led to this problem. I then discuss a few of the more famous cases that have led baseball to implement genetic testing. I also examine how Major League Baseball is deciding who to test and how this testing has affected prospects and their contracts.

A. Major League Baseball's Recruiting of Latin American Prospects

Major League Baseball has a long, storied history of employing Latin American players from almost the outset of the league.¹⁶ Nevertheless, the way in which Major League teams recruit players from Latin American countries is relatively unregulated. Players from Puerto Rico, Canada, and the United States are subject to a draft at the age of eighteen years old.¹⁷ The First-Year Player Draft is the apparatus used by Major League Baseball that permits teams to choose amateurs for their teams.¹⁸ Players from Latin American countries do not enter

[hereinafter *Tejada Admits to Being Two Years Older*] (showing that as far back as 1993, ballplayers from Latin American countries were lying about their ages).

¹² See Vanessa Marie Zimmer, *Dragging Their Devotion: The Role of International Law in Major League Baseball's Dominican Affairs*, 4 NW. U. J. INT'L HUM. RTS. 418, 419-25 (2005) (examining the recruiting process of Dominican recruits as compared to the process for American and Canadian prospects).

¹³ See Diana L. Spagnuolo, Comment, *Swinging for the Fence: A Call for Institutional Reform as Dominican Boys Risk Their Futures for a Chance in Major League Baseball*, 24 U. PA. J. INT'L ECON. L. 263, 272-73 (2003) (describing the relative poverty of Dominican prospects and how baseball money benefits the local areas).

¹⁴ Edward Wong, *Little League Tightens Its Rules*, N.Y. TIMES, Dec. 12, 2001, at S4 (explaining how Little League Baseball had to make rule changes after the Danny Almonte scandal in August of that year).

¹⁵ Schmidt & Schwarz, *supra* note 5.

¹⁶ See generally Jeffrey S. Storms, *El Monticulo ("The Mound"): The Disparate Treatment of Latin American Baseball Players in Major League Baseball*, 2 U. ST. THOMAS J. L. & PUB. POL'Y 81 (2008) (providing a discussion of the storied history of Latin American baseball players in Major League Baseball).

¹⁷ See Zimmer, *supra* note 12, at 419-20.

¹⁸ *First-Year Player Draft: Official Rules*, MLB.COM, <http://mlb.mlb.com/mlb/draftday/rules.jsp> (last visited Feb. 6, 2011).

Major League Baseball through the draft. Vanessa Marie Zimmer explains, "According to Major League Rule 3(a)(1)(B), a player not subject to the Draft may be signed at age seventeen, or at age sixteen, providing he will turn seventeen prior to either the end of the baseball season in which he is signed or September first of the year in which he is signed."¹⁹ Even with these regulations, Major League teams themselves have violated the rules by signing prospects below the age required by Major League Baseball.²⁰ Because of the lack of a draft, recruitment of young prospects is left to the whim of Major League scouts and *buscones*. *Buscones* are "finders" that aid scouts in locating talent.²¹ One Major League assistant general manager described Latin American recruiting by saying that "[i]t's the wild west down there. . . ."²²

Buscones and scouts only complicate matters because of their own motives and profit seeking. While it is not clear that *buscones* are involved in the identity fraud process, their primary objective is to identify talent at the earliest possible age.²³ This extremely young recruitment age establishes an incentive for players who may be older to lie about their ages because recruiters may not be interested in older players. *Buscones* have an incentive to recruit younger players because *buscones* are generally paid a percentage of the signing bonuses received by the prospect through an agreement reached between the *buscones* and the young prospect.²⁴ Generally, the younger the talent, the more valuable they are to Major League teams.²⁵ Younger prospects are a better investment for Major League teams because, barring injury, they will play in the league longer.

While the system itself promotes youth, the poverty that most players from Latin America are trying to escape probably provides the greatest motive for players to commit identity fraud. Vanessa Marie Zimmer explains, "There is triumph and fortune to be had for the few, but there is failure and a per capita income of \$1,600 a year for the

¹⁹ Zimmer, *supra* note 12, at 420.

²⁰ *Id.* at 420-21 ("The Cleveland Indians were also exposed for violating Major League Rules by signing fifteen-year-old Laumin Bessa, dating relevant documents in advance so as to appear that they were signed after Bessa's sixteenth birthday.").

²¹ Zimmer, *supra* note 12, at 422-23.

²² Alan Schwarz, *Pressure Building for Draft of Players from Outside U.S.*, N.Y. TIMES, July 13, 2008, at B4.

²³ Spagnuolo, *supra* note 13, at 274.

²⁴ Storms, *supra* note 16, at 91 (noting the disproportionate amount of money that *buscones* receive compared to scouts in the United States).

²⁵ See Schmidt & Schwarz, *supra* note 5 (quoting an international scout for a major league team concerning the difference in the eyes of baseball between the ages of sixteen and nineteen).

rest.”²⁶ The dream of huge signing bonuses and salaries provides incentive for a prospect to say he is younger than he actually is. In a recent case, the Oakland A’s paid a bonus of \$4.25 million to a seventeen-year-old pitcher from the Dominican Republic.²⁷ However, players from Latin American countries often receive much smaller starting bonuses and salaries than players from the United States. Zimmer provides the example that “in 2000 the Cleveland Indians signed forty Latin American players for approximately \$700,000” total.²⁸ Regardless, any amount of money and the hope of a future professional baseball career is enough for a minor to lie about his age or identity in countries wrought with poverty.

B. Examples of Identity Fraud in Baseball Prior to Major League Baseball’s DNA Testing

Speculation concerning age had surrounded a number of Major League Baseball’s most high profile talent for years. Probably the most well known case to date is Miguel Tejada’s revelation that he was actually two years older than he stated he was when he signed with the Oakland Athletics.²⁹ In an interview with “E:60” correspondent Tom Farrey, Tejada explained, “I was a poor kid. I wanted to sign a professional contract, and that was the only way to do it. I didn’t want or mean to do anything wrong. At the time, I was two years older than they thought.”³⁰ However, this revelation did not have much of an impact on Tejada’s career considering he was an all-star caliber short-stop at the time of the discovery. Nevertheless, this type of fraud hurts ball clubs who try to build teams around talent that they believe will be there or will be at the top of their game for much longer. Questions could be raised as to whether the Houston Astros, the team Tejada played for at the time the news broke about his age, would have offered Tejada the same sizeable contract of \$72 million over six years if they had known that he was two years older than he claimed to be.³¹ It is clear, however, that he most likely would not have re-

²⁶ Zimmer, *supra* note 12, at 418 (footnote omitted) (describing the appeal of baseball in a country where there is mass poverty like the Dominican Republic).

²⁷ See Schwarz, *supra* note 22; Jorge Arangur , Jr. & Luke Cyphers, *It’s Not All Sun and Games*, ESPN.COM (Mar. 12, 2009), <http://sports.espn.go.com/espnmag/story?id=3974952>.

²⁸ Zimmer, *supra* note 12, at 423.

²⁹ Schmidt & Schwarz, *supra* note 5.

³⁰ Tejada Admits to Being Two Years Older, *supra* note 11.

³¹ Le Anne Schreiber, *ESPN Journalism: The Ups and Downs of Coloring Outside the Lines*, ESPN.COM (May 15, 2008), http://sports.espn.go.com/espn/columns/story?columnist=schreiber_leanne&id=33983

ceived his original minor league contract worth \$2,000 if he had not lied about his age.³²

Miguel Tejada is not the only high priced talent in Major League Baseball to have lied about his age in order to receive a professional baseball contract.³³ The true extent of the problem is obvious from the Danny Almonte case. While Almonte was not a professional baseball player, his case brought national attention to the problem of identity fraud.³⁴ Danny Almonte was an ace pitcher from the Dominican Republic on the Bronx team during the 2001 Little League World Series.³⁵ Little League officials raised questions concerning Almonte's age and ultimately determined that he was actually fourteen years old instead of twelve, which is what his falsified birth certificate stated.³⁶ This instance is shocking because adults manipulated a child in order to help a twelve-year-old all-star team win tournaments. While this case is not on par with the extravagance of a Major League Baseball contract, it does demonstrate the extent to which players are willing to go to escape poverty and the challenges Major League Baseball faces in trying to prevent this type of fraud.

While not as high profile a case as Danny Almonte's or Miguel Tejada's, recently Major League Baseball voided a contract that the New York Yankees signed with sixteen-year-old shortstop Damian Arredondo.³⁷ The Yankees had signed Arredondo to an \$850,000 signing bonus.³⁸ However, during Major League Baseball's Department of Investigations inquiry into his background, the Department discovered that Arredondo was older than sixteen and that his name was actually not Damian Arredondo.³⁹ The Yankee's were thankful for how swift the investigation process was and that they did not lose

72 (questioning what the Houston Astros knew about Tejada's age when they signed him to the contract the spring before the age related issues arose).

³² *Id.*

³³ Jim Litke, *MLB Discovers Fountain of Youth in Dominican*, LJWORLD.COM (Feb. 22, 2009), <http://www2.ljworld.com/news/2009/feb/22/mlb-discovers-fountain-youth-dominican/> (listing players like Bartolo Colon and Rafael Furcal as other examples of high-priced players having to adjust their ages).

³⁴ See Spagnuolo, *supra* note 13, at 276 (discussing the attention that Danny Almonte received for lying about his age to participate in the Little League World Series).

³⁵ Wong, *supra* note 14.

³⁶ *Id.*

³⁷ Melissa Segura, *Source: MLB Nixes Yanks' Signing of Player with Fraudulent Identity*, SI.COM (July 17, 2009), <http://sportsillustrated.cnn.com/2009/baseball/mlb/07/16/yankees.signing/index.html>.

³⁸ *Id.*

³⁹ *Id.*

any money since his bonus was contingent upon the outcome of the investigation.⁴⁰

C. Combating Identity Fraud: Major League Baseball's Use of DNA Testing

Only recently did Major League Baseball reveal that it was using DNA tests and bone scans to determine the identity and age of prospects from Latin American countries when questions arise as to their true identity and age.⁴¹ Schmidt and Schwarz reported that "[a] baseball official said that individual teams have been conducting DNA tests for a few years and that the league's department of investigations has been doing it for the past year."⁴² Major League Baseball is not doing testing on every prospect that comes from a Latin American country. In a written statement, Major League Baseball described its use of DNA testing in the Dominican Republic as limited to "very rare instances and only on a consensual basis to deal with the identity fraud problem that the league faces in that country."⁴³ The DNA testing performed by the league and individual teams is a last resort to other investigative means. Investigators for the league first do a background check to see if prospects are being truthful about their ages and identities.⁴⁴ Once a discrepancy is found, however, the prospect is "invited to provide a DNA sample from himself and his parents to clear up the concern."⁴⁵ The prospect and his family are charged for the examinations, but they are reimbursed if it is proven that he is telling the truth.⁴⁶ Major League Baseball and various teams employ both DNA tests and bone-scans to get a more complete picture of the potential player's background.⁴⁷ The bone-scans provide an age range within which the potential player falls.

The DNA test combats a problem that the bone-scan cannot. If a potential player's stated age fits somewhere within the range provided by the bone-scan then, without DNA tests, these prospects would not be caught even if they were five years older than they claimed to be so long as they were within the age range. Some prospects find families who have deceased young children and, for an amount of money, claim that they are the family's child.

⁴⁰ *Id.*

⁴¹ See Schmidt & Schwarz, *supra* note 5.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Sanchez, *supra* note 10.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

In a limited number of cases thus far, the DNA tests have been used to terminate contracts where the tests have shown that the prospect is lying about his age or identity. Michael Schmidt and Alan Schwarz reported that “the Yankees voided the signing of an amateur from the Dominican Republic after a DNA test conducted by Major League Baseball’s department of investigations showed that the player had misrepresented his identity.”⁴⁸ Major League Baseball has yet to offer any statistics on the number of DNA tests it has performed and how many contracts that have been voided because of the results of the DNA tests and bone scans.⁴⁹ Nor has the league commented on what happens to the DNA results after they have been used for their intended purpose.⁵⁰ The league has made it clear, however, that the DNA tests and bone-scan procedures are not being used for any purpose other than to determine identity and age.⁵¹

Just this past year, prospect Miguel Sano underwent two separate DNA tests and bone-scan procedures at the request of the Pittsburgh Pirates and investigators for Major League Baseball.⁵² Because he was a talented prospect at the age of sixteen, both the teams who were vying for him and the league wanted to verify that Sano was exactly the age he said he was.⁵³ Tests were performed on Sano, his parents, and his younger sister to determine his identity and age.⁵⁴ The bone-scan showed that he was between the ages of sixteen and seventeen and the DNA test confirmed his identity.⁵⁵ While Major League Baseball claims that these tests are voluntary, Sano’s agent, Robert Plummer, has a different take on the matter.⁵⁶ He explains, “Players are being forced to do the DNA testing—what other choice do they have? If they don’t do it, they’re guilty. If you’re clean, you should want to do it.”⁵⁷ John Mirabelli, the Cleveland Indians Assistant General Manager, echoes this sentiment that the testing is not voluntary.⁵⁸

⁴⁸ Schmidt & Schwarz, *supra* note 5.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ See Alan Schwarz, *A Future in Baseball, Hinging on DNA*, N.Y. TIMES, July 23, 2009, at B11.

⁵² See *id.*; see also Schmidt & Schwarz, *supra* note 5.

⁵³ See Schwarz, *supra* note 51.

⁵⁴ *Id.*

⁵⁵ Enrique Rojas, *Sano’s Work Visa Completes Twins Deal*, ESPN.COM (Dec. 5, 2009), <http://sports.espn.go.com/mlb/news/story?id=4716455>.

⁵⁶ Schwarz, *supra* note 51.

⁵⁷ *Id.*

⁵⁸ See Anthony Castrovence, *Tribe to Use Identity Testing For Prospects*, MLB.COM (Sept. 9, 2009, 3:48 PM), http://cleveland.indians.mlb.com/news/article.jsp?ymd=20090920&content_id=7060270&vkey=news_cl&fext=.jsp&c_id=cle

Discussing what his franchise would do if a prospect refused to submit to DNA testing, Mirabelli explained, "If a kid and his family decide to decline, we'll pull our offer. . . ."⁵⁹ After one of the Indian's major prospects from the Dominican Republic turned out to be nineteen years old instead of sixteen, as he claimed to be, the Indians decided to petition Major League Baseball to perform DNA tests on two of their other top prospects from the area.⁶⁰ Mirabelli expressed the belief that Major League Baseball will soon request testing on all prospects from Latin America signed for over \$50,000.⁶¹ Major League Baseball is currently reviewing its use of DNA testing to combat identity fraud; indeed, it says that it may continue to ask prospects to submit to genetic testing.⁶² However, Major League Baseball will have to contend with bio-ethicists, the new GINA statute, and international law if it wishes to continue performing these DNA tests.

II. GINA AND INTERNATIONAL LAW

Concern over Major League Baseball's DNA testing on prospects from Latin American countries focuses primarily on the uncertainty of GINA's provisions and how they will be interpreted.⁶³ Due to concerns of genetic discrimination by employers and the insurance industry, Congress passed GINA in 2008.⁶⁴ International law has asserted that genetic testing threatens individual freedom and privacy.

In this section, I explore the provisions of GINA, starting with a brief overview of predictive genetics and ending with a discussion of the actual protections that GINA provides. I also discuss some of the perceived shortcomings of GINA. Furthermore, I will examine the international community's perception of genetic testing and its response in international declarations and legislation. I will examine the United Nations' Universal Declaration on the Human Genome and Human Rights and the International Declaration on Human Genetic Data.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Michael S. Schmidt, *Baseball Emissary to Review Troubled Dominican Pipeline*, N.Y. TIMES, Mar. 11, 2010, at B13.

⁶³ See Schmidt & Schwarz, *supra* note 5.

⁶⁴ See Mark A. Rothstein, *GINA's Beauty is Only Skin Deep*, GENE WATCH, Apr.-May 2009, at 9 (explaining the long fight in Congress that took thirteen years to actually come to agreement over the legislation).

A. GINA

1. Predictive Genetics

From its inception, the mapping of the human genome created hope as to the advances in medicine that would result from the “insight into human biology and evolution, as well as clues to prevent, detect and fight disease.”⁶⁵ The project has delivered on a number of these aspirations.⁶⁶ One of the benefits of a greater understanding of the human genome is the improvement of predictive medicine—determining the likelihood that someone may develop a given disorder.⁶⁷ Anita Silvers and Michael Ashley Stein explain, “Predictive genetic testing typically is used to learn whether individuals who do not currently exhibit symptoms of certain diseases are at a higher than usual risk of developing them.”⁶⁸ To demonstrate the power of predictive genetic testing, Jean Dausset explains that linked to one genomic system, the HLA system, are predispositions to fifty diseases.⁶⁹ The HLA system “is composed of five main genes (A, B, C, DR, DQ) situated next to each other on chromosome 6.”⁷⁰ The product of these genes is found on the surface of most cells and their function is to “trigger the body’s defenses . . . by distinguishing between what is alien and what is not.”⁷¹ This one system represents only “one thousandth of the human genetic heritage.”⁷² Currently, genetic scientists have identified genetic predispositions for many types of cancer,⁷³ cystic fibrosis,⁷⁴ Huntington’s disease,⁷⁵ and other illnesses.

⁶⁵ Paul Billings & Sophia Koliopoulos, *What is the Human Genome?*, in *ETHICAL EYE: THE HUMAN GENOME* 19, 23 (2001).

⁶⁶ See Jean Dausset, *Predictive Medicine*, in *ETHICAL EYE: THE HUMAN GENOME* 57, 61 (2001) (explaining that now that much of much of the genome has been sequenced, new discoveries are made weekly).

⁶⁷ See generally Anita Silvers & Michael Ashley Stein, *An Equality Paradigm for Preventing Genetic Discrimination*, 55 *VAND. L. REV.* 1341, 1346-52 (2002) (discussing the benefits and costs of predictive genetic testing).

⁶⁸ *Id.* at 1346.

⁶⁹ Dausset, *supra* note 66.

⁷⁰ *Id.* at 57.

⁷¹ *Id.*

⁷² *Id.* at 61.

⁷³ *Id.* at 63-64 (explaining that the genes for many hereditary cancers have been found).

⁷⁴ *Id.* at 62.

⁷⁵ See Peter S. Harper et al., *Genetic Testing and Huntington’s Disease: Issues of Employment*, 3 *LANCET NEUROLOGY* 249, 249 (2004).

Predictive genetic testing is the primary concern of those objecting to Major League Baseball's use of DNA testing.⁷⁶ In sports, however, the concern is over the ability to accurately predict injury and athletic ability as much as it is to predict disease. In the case of Eddy Curry, a professional basketball player, the Chicago Bulls asked him to undergo genetic testing for hypertrophic cardiomyopathy before they were willing to offer him a contract because of his irregular heartbeat.⁷⁷ In terms of athletic ability, it is believed that at least some athletic traits are inherited.⁷⁸ If this is true, predictive genetic testing by sports teams could not only reveal the diseases to which their players may become prone, but also their athletic ability and susceptibility to injury. In a financially competitive environment like Major League Baseball, the possibility of predictive testing for injury, disease, and athleticism in potential players could incentivize discrimination against athletes who carry certain genetic traits.

2. Pre-GINA Concern and Debates

Concern over the possible uses of genetic information arose from the moment the Human Genome Project was commenced.⁷⁹ Patricia A. Roche explains, "Fear that genetic information will be misused to harm individuals . . . casts a shadow over this glowing portrait of the future of genomic medicine."⁸⁰ Much of the fear surrounding the use of genetic information for discriminatory purposes was focused on two main areas: employment and insurance.⁸¹ As Pauline T. Kim explains, "[T]he threat of genetic discrimination is entirely prospective;

⁷⁶ See Schmidt & Schwarz, *supra* note 5 (discussing bioethicists' concerns over what information Major League Baseball may be able to take from genetic tests that might predict injury or disease).

⁷⁷ Dean Krishna, Comment, *DNA Testing for Eddy Curry? Creating a New Constitutional Protection*, 9 U. PA. J. CONST. L. 1105, 1105 (2007) (discussing Curry's situation in his contract negotiations with the Chicago Bulls).

⁷⁸ Michael John McNamee et al., *Genetic Testing and Sports Medicine Ethics*, 39 SPORTS MED. 339, 340 (2009) (discussing the belief that sports performance is "crucially related" to the *ACTN3* gene).

⁷⁹ See Silvers & Stein, *supra* note 67, at 1349-52 (discussing potential social costs of predictive genetic testing); see also Patricia A. Roche, *The Genetic Revolution at Work: Legislative Efforts to Protect Employees*, 28 AM. J. L. & MED. 271, 271 (2002) (explaining that with the benefits of the Human Genome Project, fears started to spread about the possible uses of the information).

⁸⁰ Roche, *supra* note 79.

⁸¹ See *id.*; Kim, *supra* note 4; Silvers & Stein, *supra* note 67, at 1349-52; Tara L. Rachinsky, Comment, *Genetic Testing: Toward a Comprehensive Policy to Prevent Genetic Discrimination in the Workplace*, 2 U. PA. J. LAB. & EMP. L. 575 (2000) (all providing background and insight into the particular concerns of the use of genetic information in employment decisions).

advocates fear new technologies will be misused to reveal hidden information that will disadvantage certain individuals. . . . However, genetic technologies offer the potential to provide information that is arguably *relevant* to an employee's future job performance."⁸² The prospect that employers may be able to choose employees based on specific genetic traits that would make them more or less attractive for the position raised concerns that whole segments of society may be unemployable based on predispositions for certain disorders that they may never even develop.⁸³ In response to these concerns, legal commentators have proposed a number of different solutions, ranging from privacy rights for genetic information⁸⁴ to proposals for federal legislation banning discriminatory practices.⁸⁵ The non-legislative proposals focused on models for privacy rights or constitutional protection of privacy. Congress debated the enactment of GINA over a thirteen year period.⁸⁶

3. Language and Provisions of GINA

a. Definitions

GINA's definitions section provides important background information to aid in understanding GINA's main provisions. The terms that are critical to the application of the law to Major League Baseball's practice are "genetic information," "employer/employee," "genetic services," and "genetic tests." Under GINA, "genetic information" includes "information about—(i) such individual's genetic tests, (ii) the genetic tests of family members of such individual, and (iii) the manifestation of a disease or disorder in family members of

⁸² Kim, *supra* note 4.

⁸³ See Rachinsky, *supra* note 81, at 580-81 (naming a number of groups of people that would be at risk for discrimination if genetic information were available to employers).

⁸⁴ See generally Kim, *supra* note 4, at 1502 (arguing for a "privacy rights model" to deal with genetic discrimination in employment); see also Krishna, *supra* note 77, at 1107 (arguing for a Constitutional recognition of privacy of genetic information).

⁸⁵ See generally Rachinsky, *supra* note 81, at 598 (advocating for federal legislation to protect the "privacy of genetic information and prohibiting the discriminatory use of such information in both the employment and health insurance contexts"); see also Rivka Jungreis, *Fearing Fear Itself: The Proposed Genetic Information Nondiscrimination Act of 2005 and Public Fears About Genetic Information*, 15 J.L. & POL'Y 211, 212 (2007) (arguing for the passage of federal legislation that deals with the issue of genetic discrimination).

⁸⁶ See Rothstein, *supra* note 64 (discussing the length of time it took for passage of GINA).

such individual.”⁸⁷ However, information about a person’s age or sex is specifically excluded.⁸⁸ While Major League Baseball is seeking the truth about prospects’ ages, its actions do not fall under this exception because it is performing tests to determine the true identity of the prospect and not merely his age. Applied to Major League Baseball, the DNA test results of potential players from certain Latin American countries fall within the term “genetic information” because the information is received through a genetic test.⁸⁹ “Genetic test” is defined as an “analysis of human DNA, RNA, chromosomes, proteins, or metabolites, that detects genotypes, mutations, or chromosomal changes.”⁹⁰ Since the tests are used to determine identity, this would require an examination of the genotypes of the potential player’s DNA which would show markers of inherited traits from family members. Furthermore, GINA makes an exception to its prohibition on the acquisition of genetic information where the employer offers “genetic services” as part of a wellness program.⁹¹ Genetic services are genetic tests, genetic counseling, or genetic education as defined in GINA.⁹²

Also relevant to Major League Baseball’s use of DNA testing and how GINA might affect its efforts are the definitions of “employer” and “employee” in the statute. GINA provides multiple definitions for the term “employer.”⁹³ The statute covers private employers, state employers, employment offices and the federal government.⁹⁴ For private employers, GINA defines an employer as “an employer (as defined in section 701(b) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(b))).”⁹⁵ Under the Civil Rights Act of 1964, an employer is defined as “a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person. . . .”⁹⁶ Similarly, GINA looks to the Civil Rights Act of 1964 for its definition of “employee,” which it defines

⁸⁷ Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, § 201, 122 Stat. 881, 906 (to be codified at 42 U.S.C. § 2000ff).

⁸⁸ *Id.*

⁸⁹ *See id.* § 201, 122 Stat. at 906.

⁹⁰ § 201, 122 Stat. at 907.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *See* § 201, 122 Stat. at 906.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ 42 U.S.C. § 2000e(b) (2006).

simply as "an individual employed by an employer. . . ." ⁹⁷ GINA also includes the term "applicant" in the definition of "employee." ⁹⁸

While Major League Baseball is an employer since it has more than fifteen employees, the question is whether professional baseball players are employees of Major League Baseball. Since the Civil Rights Act of 1964 does not define the term "applicant" in its definition of "employee," ⁹⁹ it is important to see how the EEOC defines an "applicant" since the EEOC is charged with enforcing GINA's employment discrimination provisions. ¹⁰⁰ The EEOC definition of applicant depends upon the hiring process of the company and whether the person has indicated an interest in being considered for hiring. ¹⁰¹ Latin American prospects fit into this definition. While recruits from Latin America would qualify as applicants because they have demonstrated an interest in being hired, it is unclear whether their employer would be Major League Baseball or the teams themselves. George G. Daly, discussing the structure of professional sport leagues, explains:

"[T]he league itself is a composite structure made up of a number of independently owned and managed teams. Individual teams are granted franchises, which consist of a variety of rights and related restrictions governing many aspects of their operations. The teams collectively own the league, making it in effect, a franchisee-owned franchisor." ¹⁰²

In this structure, the teams are no doubt employers as they contract with the players directly, thus GINA applies to their use of DNA exams. Major League Baseball, however, does not directly employ the potential players.

To answer this question, it is helpful to look to Major League Baseball's employer-employee relationship in other contexts such as discrimination. Major League Baseball has previously been a defendant in a Title VII discrimination suit as an "employer" brought by

⁹⁷ § 2000e(f).

⁹⁸ §201, 122 Stat. at 905.

⁹⁹ 42 U.S.C. § 2000e(f).

¹⁰⁰ § 207, 122 Stat. at 914-17.

¹⁰¹ *Questions and Answers: Definition of "Job Applicant" for Internet and Related Electronic Technologies*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N., <http://www.eeoc.gov/policy/docs/qanda-ugesp.html> (last visited Feb. 6, 2011) (explaining what the E.E.O.C.'s technical definition of "job applicant" is in all situations).

¹⁰² George G. Daly, *The Baseball Player's Labor Market Revisited*, in *DIAMONDS ARE FOREVER: THE BUSINESS OF BASEBALL* 11, 12 (Paul M. Sommers ed., 1992).

former players in the league.¹⁰³ The players sued because Major League Baseball provided benefits to Negro League players who did not play the requisite number of years to qualify for benefits, while not providing those benefits to Caucasian players in similar circumstances.¹⁰⁴ The court dismissed the claim on summary judgment without discussing Major League Baseball's status as an "employer", finding that the employees were not "similarly situated" and that, in the alternative, Major League Baseball had a non-discriminatory purpose for providing benefits to players from the Negro League who had never played in Major League Baseball.¹⁰⁵

The Supreme Court has also ruled on the definition of "employee" in the Employee Retirement Income Security Act, which is defined identically as in GINA.¹⁰⁶ The Supreme Court found that such general definitions require the adoption of principles from the common law of agency.¹⁰⁷ It decided that an important factor in determining if someone qualifies as an employee is the amount of control the hiring party has over "the manner and means by which the product is accomplished."¹⁰⁸ As the governing body, Major League Baseball controls every aspect of the game the players play. Although individual teams pay the players and decide who plays based on their performance, Major League Baseball decides the rules by which the game is played, can issue fines for violating its rules and can suspend and banish players. Therefore, Major League Baseball is an employer as defined by GINA and the potential players are employees under GINA's provisions.

b. General Provisions

In addressing "genetic information," GINA establishes two broad prohibitions.¹⁰⁹ GINA first makes it an illegal practice for employers to "discriminate . . . because of genetic information."¹¹⁰ Under GINA's prohibition on discrimination based on genetic information,

¹⁰³ See *Moran v. Selig*, 447 F.3d 748, 748 (9th Cir. 2006).

¹⁰⁴ *Id.* at 749.

¹⁰⁵ *Id.* at 760.

¹⁰⁶ *Nationwide Mut. Ins. v. Darden*, 503 U.S. 318 (1992).

¹⁰⁷ *Id.* at 322-23.

¹⁰⁸ *Id.* at 323 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 740 (1989)).

¹⁰⁹ See Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, § 202, 122 Stat. 881, 907 (to be codified at 42 U.S.C. § 2000ff); see also Eric N. Miller, *The Genetic Information Nondiscrimination Act of 2008*, SP003 ALI-ABA 2013, 2017 (2008) (American Bar Institute—American Bar Association Continuing Legal Education Course on Current Developments in Employment Law).

¹¹⁰ § 202, 122 Stat. at 907.

employers are prohibited from engaging in three practices. It is unlawful for an employer to “fail or refuse to hire, or to discharge, any employee . . . because of genetic information with respect to the employee.”¹¹¹ Furthermore, GINA prohibits employers from “discriminat[ing] against any employee with respect to the compensation, terms, conditions, or privileges of employment of the employee[s]” based on genetic information of the employee.¹¹² Lastly, GINA prohibits employers from limiting, segregating, or classifying an employee in a way that would “deprive or tend to deprive any employee of employment opportunities or otherwise adversely affect the status of the employee as an employee . . .” based on the employee’s genetic information.¹¹³ Together these three prohibitions provide a blanket protection for employees against the misuse of genetic information by employers with respect to hiring, terms of employment, and opportunities available to an employee.

GINA also prohibits employers from requesting or requiring genetic information as a condition of employment.¹¹⁴ Similarly, GINA prohibits employers from purchasing genetic information with respect to an employee.¹¹⁵ However, unlike the anti-discrimination mandate, the prohibition on the acquisition of genetic information as a condition of employment has several exceptions.¹¹⁶ The exceptions focus on employers who offer health or genetic services, inadvertent requests, particular statutes, public documents, law enforcement, and the biological effects of toxic substances.¹¹⁷ These exceptions are not relevant to Major League Baseball’s use of DNA in recruiting prospects from Latin American countries. Since Major League Baseball’s request for DNA samples is not inadvertent and certainly does not fit within the other exceptions, GINA prohibits Major League Baseball and its teams from requesting, requiring, or purchasing the genetic information of potential players.

GINA also protects genetic information that has already been acquired by legal means.¹¹⁸ Section 206 provides guidelines for the treatment of genetic information and limitations on the disclosure of

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* § 202, 122 Stat. at 907-08; see Morse Hyun-Myung Tan, *Advancing Civil Rights, The Next Generation: The Genetic Information Nondiscrimination Act of 2008 and Beyond*, 19 HEALTH MATRIX 63, 115-16 (2009) (discussing the exceptions to the prohibition of requiring genetic information as a condition of employment).

¹¹⁷ § 202, 122 Stat. at 907-08.

¹¹⁸ See § 202, 122 Stat. at 913-14.

the information.¹¹⁹ Under this provision, disclosure is only permitted in very limited circumstances.¹²⁰ First, this section requires that employers who are in possession of genetic information concerning an employee take care to maintain the information on “separate forms and in separate medical files [to] be treated as a confidential medical record of the employee. . . .”¹²¹ Secondly, this section allows the disclosure of the information only to the employee (at the employee’s written request), to health researchers (by court order), to government officials investigating a violation of GINA, to name the party for purposes of the Family and Medical Leave Act, or to a Federal, State, or local public health agency if it concerns a contagious disease.¹²² Since this section addresses the issue of how to deal with the information once it has already been obtained and does not prohibit the acquisition of the information, Major League Baseball must contend with its strict guidelines once it is in possession of genetic information.

B. International Law

Since GINA has only recently become effective, aspects of its application are still unclear. In particular, questions remain unanswered as to its application in situations where an American employer uses genetic testing in a foreign country.¹²³ International organizations and countries have also taken up the issue of how to deal with the rising concerns regarding genetic testing and the possibility of discrimination arising from it.

International law has approached this problem from the viewpoint of human rights. The main impetus behind international action is a fear of a return to policies of eugenics, such as those implemented during World War II.¹²⁴ The most important international declarations to address the issue are both from the United Nations Educational, Scientific and Cultural Organization (UNESCO). They are titled the 1997 Universal Declaration on the Human Genome and Human Rights and the 2003 International Declaration on Human Genetic Data.¹²⁵ Many Latin American countries are members of UNESCO, in-

¹¹⁹ See *id.*

¹²⁰ § 202, 122 Stat. at 914.

¹²¹ § 202, 122 Stat. at 913.

¹²² § 206, 122 Stat. at 914.

¹²³ See Schmidt & Schwarz, *supra* note 5.

¹²⁴ See generally Iulia Voina Motoc, *The International Law of Genetic Discrimination: The Power of Never Again*, in *NEW TECHNOLOGIES AND HUMAN RIGHTS* 222, 222 (Thérèse Murphy ed., 2009) (explaining that the fear of eugenics has been the main impetus towards limiting the use of genetics for discriminatory purposes starting with the Universal Declaration of Human Rights of 1948).

¹²⁵ See *id.* at 223-24.

cluding the Dominican Republic, which is the primary country in which Major League Baseball has been carrying out its DNA tests.¹²⁶ Yet developing countries have lagged behind European and industrialized countries in enacting their legislation prohibiting genetic discrimination.¹²⁷ In particular, the Dominican Republic does deal with discrimination in its Labor Code.¹²⁸ However, the provision on discrimination is not included in any of the articles of the code, but instead is included in the "Fundamental Principles" section. The fundamental principle prohibiting discrimination lists a number of types of discrimination that are prohibited but does not include genetic discrimination.¹²⁹ For this reason, I have excluded it from discussion. In this section, I will examine how the UNESCO declarations apply to Major League Baseball's use of DNA testing in the Latin American region.

1. The Universal Declaration on the Human Genome and Human Rights

The Universal Declaration on the Human Genome and Human Rights offers a guarantee of non-discrimination based on genetics¹³⁰ and requires each signatory country to implement legislation to ensure this guarantee.¹³¹ Article 6 of the declaration provides that "No one shall be subjected to discrimination based on genetic characteristics that is intended to infringe or has the effect of infringing human rights, fundamental freedoms and human dignity."¹³² Whereas GINA specifically prohibits Major League Baseball's actions, the Universal Declaration on the Human Genome and Human Rights has no provision specifically prohibiting the acquisition of genetic information from future employees. Because it establishes no prohibitions against the acquisition of genetic information, it is not proactive in eliminating the temptation of discriminating. Furthermore, the actions of Ma-

¹²⁶ *Member States*, UNESCO.ORG, <http://erc.unesco.org/portal/UNESCOMemberStates.asp?language=en> (last visited Jan. 18, 2009).

¹²⁷ See Allyn L. Taylor, *Globalization and Biotechnology: UNESCO and an International Strategy to Advance Human Rights and Public Health*, 25 AM. J.L. & MED. 479, 500 (1999) ("The vast majority of developing nations have yet to develop any legislation addressing the potential problems posed by genetics.").

¹²⁸ Labor Code, principle VII (Dom. Rep.), available at <http://www.set.gov.do/descargas/download/cod001.pdf>.

¹²⁹ *Id.*

¹³⁰ Universal Declaration on the Human Genome and Human Rights, U.N. Educational, Scientific and Cultural Organization on its 29th Sess., Oct. 21–Nov. 12, 1997, U.N. Doc. 29C/Res. 16 (Nov. 11, 1997).

¹³¹ See *id.* at 45.

¹³² *Id.* at 43.

Major League Baseball under this provision would not be considered discrimination and therefore would not be illegal. Thus far, Major League Baseball is not discriminating against potential players based on their DNA. It is only refusing contracts to those players whose DNA tests demonstrate that they are lying about their age or identity.

The Universal Declaration on the Human Genome and Human Rights also provides minimal guidelines for implementing the principles it sets forth.¹³³ The only implementation the declaration provides is in Article 22.¹³⁴ It states, "States should make every effort to promote the principles set out in this Declaration and should, by means of all appropriate measures, promote their implementation."¹³⁵ This allows great discretion to individual national governments and thus it is no surprise that industrialized countries have been quicker than their non-industrialized counterparts to implement laws that restrict the use of genetic information.¹³⁶ The effectiveness of the declaration rests in the hands of individual governments and provides no consistent standard to which Major League Baseball can look to as it conducts DNA testing in various countries in Latin America, since each country could implement its own version of genetic anti-discrimination laws.

2. The International Declaration on Human Genetic Data

The International Declaration on Human Genetic Data is much more specific in its principles and has a more effective oversight and implementation apparatus.¹³⁷ The International Declaration on Human Genetic Data begins with a definition section which clarifies many of the ambiguities characteristic in the Universal Declaration on the Human Genome and Human Rights.¹³⁸ The most important definitions address "consent" and "genetic testing." "Consent" under this provision is defined as "[a]ny freely given *specific*, informed and express agreement of an individual to his or her genetic data being collected, processed, used and stored."¹³⁹ UNESCO's definition places emphasis on the term *specific*, requiring the consent to be tailored to the given situation.¹⁴⁰ UNESCO's definition of genetic testing encompasses a

¹³³ *Id.* at 45.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ See Taylor, *supra* note 127, at 500-01.

¹³⁷ See International Declaration on Human Genetic Data, U.N. Educational, Scientific and Cultural Organization on its 32nd Sess., Sept. 29–Oct. 17, 2003, U.N. Doc. 32 C/Res. 22 (Oct. 16, 1003).

¹³⁸ See *id.* at 40-41.

¹³⁹ *Id.* at 40.

¹⁴⁰ *Id.*

wide variety of different tests, including the DNA tests that Major League Baseball is conducting. Genetic testing includes procedures to "detect the presence or absence of, or change in, a particular gene or chromosome, including an indirect test for a gene product or other specific metabolite that is primarily indicative of a specific genetic change."¹⁴¹

Article 8 lays the foundation for permissible collection of genetic information.¹⁴² Article 8(a) requires "[p]rior, free, informed and express consent, without inducement by financial or other personal gain. . . ."¹⁴³ Major League Baseball claims that its testing is being undertaken on a consensual basis.¹⁴⁴ Under this provision of the International Declaration of Human Genetic Data, the consent obtained by Major League Baseball would not be meaningful because there are significant financial and personal gains inducing the potential players to undergo genetic testing.¹⁴⁵ Coupled with the consent requirement is a non-discrimination provision in Article 7.¹⁴⁶ It provides that:

Every effort should be made to ensure that human genetic data and human proteomic data are not used for purposes that discriminate in a way that is intended to infringe, or has the effect of infringing human rights, fundamental freedoms or human dignity of an individual or for purposes that lead to the stigmatization of an individual, a family, a group or communities.¹⁴⁷

Under this provision, Major League Baseball's DNA testing might be allowed, just as it would likely be permitted under the Universal Declaration on the Human Genome and Human Rights because of its non-discriminatory intent.¹⁴⁸ This is not a proactive provision meant to prevent the slightest temptation of impermissible use as

¹⁴¹ *Id.* at 41.

¹⁴² *Id.* at 42.

¹⁴³ *Id.*

¹⁴⁴ Schmidt & Schwarz, *supra* note 5 ("In a written statement, Major League Baseball said that it used DNA testing in the Dominican Republic 'in very rare instances and only on a consensual basis. . . .').

¹⁴⁵ See Schwarz, *supra* note 22 (describing the huge bonuses and salaries some players receive).

¹⁴⁶ International Declaration on Human Genetic Data, *supra* note 137, at 42.

¹⁴⁷ *Id.*

¹⁴⁸ See Schmidt & Schwarz, *supra* note 5 (claiming that the tests are only used to combat identity fraud and for no other purpose).

GINA intends to do.¹⁴⁹ While the non-discrimination provision would allow Major League Baseball to continue its DNA testing because of its non-discriminatory nature, Major League Baseball's consent procedures under the provisions of the International Declaration on Human Genetic Data are highly problematic due to large financial incentives that pressure potential players to undergo genetic testing. Major League Baseball is unable to satisfy the consent requirement and thus its use of genetic testing violates the International Declaration on Human Genetic Data.

As in the case of the Universal Declaration on the Human Genome and Human Rights, the enforcement of the International Declaration on Human Genetic Data is left in the hands of individual countries.¹⁵⁰ Article 23 asks that "[s]tates should take all appropriate measures, whether of a legislative, administrative or other character, to give effect to the principles set out in the Declaration, in accordance with the international law of human rights."¹⁵¹ However, while this may have little to no effect depending on the country's inclination to implement all, some, or none of the principles set forth, the International Declaration on Human Genetic Data does ask the International Bioethics Committee and the Intergovernmental Bioethics Committee to jointly contribute to the implementation of the principles set out in the Declaration by monitoring and evaluating its implementation based on reports provided by individual States.¹⁵² Ultimately it is the individual countries that decide how they want to implement this Declaration. As with the Universal Declaration on the Human Genome and Human Rights, Major League Baseball has to look individually at each country's laws to determine if it is in compliance with that country's specific implementation of the International Declaration on Human Genetic Data. Although the Dominican Republic has the examples of these two Declarations to work off of, it has failed to implement any genetic discrimination policy.

¹⁴⁹ See *id.* (quoting Dr. Kathy Hudson saying, "'The point of GINA was to remove the temptation and prohibit employers from asking or receiving genetic information.'").

¹⁵⁰ See International Declaration on Human Genetic Data, *supra* note 137, at 45.

¹⁵¹ *Id.*

¹⁵² *Id.* at 45-46.

III. PROPOSALS FOR AN AMENDMENT TO GINA AND INTERNAL SAFEGUARDS FOR MAJOR LEAGUE BASEBALL

GINA's prohibition of discrimination based upon genetic information and its prohibition of employers requesting, requiring, or purchasing genetic information¹⁵³ places severe restrictions on Major League Baseball's efforts to combat identity fraud in countries like the Dominican Republic. Major League Baseball's efforts to combat this problem include a number of different investigative tools; however, the last-resort use of DNA testing and bone-scans presents a problem to the League's efforts.¹⁵⁴ Jorge Lopez presents a stunning examination of how rampant identity fraud became in the Dominican Republic and how Major League Baseball's efforts have reduced the amount of fraud being committed.¹⁵⁵ He explains that:

MLB found age and identity fraud among newly signed Dominican players was up to nearly 60% in 2002, and the next year it strongly encouraged teams to conduct background checks. The incidence was down to 25% last, when 561 players were signed, but over the last five years an average of 145 cases of attempted fraud still was detected.¹⁵⁶

Even though Major League Baseball is reviewing its use of DNA tests and attempting to come up with alternatives,¹⁵⁷ it still faces an identity fraud problem to which one of the best solutions is to conduct DNA tests and bone-scans.

In this section, I argue that Congress should amend GINA to allow Major League Baseball to continue its genetic testing program because it is faced with a legitimate identity fraud problem. Of course, it would need to implement safeguards to prevent any impermissible use of the genetic information and attempt to reduce the need for genetic testing by establishing a stronger presence in Latin America and eliminating the need for *buscones* who are a major factor behind the

¹⁵³ Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, § 202, 122 Stat. 881, 907 (codified at 42 U.S.C. § 2000ff).

¹⁵⁴ Jorge L. Ortiz, *Exploitation, Steroids Hitting Home in Dominican Republic*, USA TODAY, (Mar. 26, 2009), http://www.usatoday.com/sports/baseball/2009-03-26-dominican-republic-cover_N.htm (explaining Major League Baseball's increased effort in document examination to combat identity fraud).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ See Schmidt, *supra* note 62 (explaining that some of the alternatives are finger printing and setting up youth leagues run by Major League Baseball).

identity fraud problem. While amending a federal law for a singular employer may seem drastic, Congress has held hearings on steroids in Major League Baseball¹⁵⁸ and allows the league to have an anti-trust exemption.¹⁵⁹ Thus, legislative action on particular matters important to Major League Baseball is not unfounded. Major League Baseball is unique in that it is combating an existing, known identity fraud problem. I further argue that Major League Baseball must take steps to protect genetic privacy beyond those currently found in GINA.¹⁶⁰

A. Amendment of GINA

Although GINA's provisions have not been enforced against Major League Baseball yet, if enforced, GINA's restrictions on the acquisition of genetic information will limit Major League Baseball's ability to combat its identity fraud problem.¹⁶¹ Efforts such as fingerprinting at the age of twelve, which Major League Baseball is considering implementing, will not itself eliminate the need for genetic testing, since prospects may begin to perpetrate their fraud at an earlier age.¹⁶² While there should be concern about any employer attempting to acquire genetic information, Major League Baseball's use of DNA tests does not present some of the general concerns that bioethicists have expressed in the employment realm.¹⁶³ Thus far, there has been no evidence of impropriety against Major League Baseball or allegations of discriminatory practices. With safeguards in place for the privacy of the information, as I will discuss in Section B, as long as Major League Baseball continues to combat identity fraud, it should be allowed to continue using DNA testing and bone-scans as a last resort.¹⁶⁴ As a result of the legitimate concerns of Major League Baseball and the extent of the problems it must face, I propose that Congress adopt an amendment to GINA adding another exception to the

¹⁵⁸ *ESPN.com's Steroid Hearing Scorecard*, ESPN.COM (Mar. 17, 2005), <http://sports.espn.go.com/mlb/news/story?id=2014564>.

¹⁵⁹ See generally Keith Bradsher, *Congressmen Pledge to Revoke Baseball's Antitrust Exemption*, N.Y. TIMES, Dec. 24, 1994, at A1 (providing a historical explanation of the exemption).

¹⁶⁰ Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, § 206, 122 Stat. 881, 913 (codified at 42 U.S.C. § 2000ff).

¹⁶¹ See § 202, 122 Stat. at 907.

¹⁶² Schmidt, *supra* note 62.

¹⁶³ See Kim, *supra* note 4 (explaining the concern that employers may use genetic information to discriminate against people who present genetic traits either showing increased risk for disease or traits that may make their jobs more difficult).

¹⁶⁴ Schmidt & Schwarz, *supra* note 5 (quoting a Major League Baseball written statement which states that testing is done in "very rare instances").

acquisition of genetic information as set out in section 202.¹⁶⁵ Currently, there are six exceptions, but none have an effect on Major League Baseball's situation.¹⁶⁶ The amendment should be drafted narrowly so as to allow only Major League Baseball to combat its identity fraud problem. This amendment should allow Major League Baseball not only to conduct genetic testing for identity fraud purposes as a condition of employment, but also to either refuse to hire any person whose tests reveal fraud, or to discharge them based upon a test result demonstrating fraud.

As a requirement to be allowed to conduct genetic testing to prevent identity fraud, Congress should again amend GINA creating an accountability apparatus. The amendment should force Major League Baseball to make reports to a commission established by Congress regarding all instances of DNA testing performed by it, allowing there to be oversight over Major League Baseball's actions. With these safeguards in place, both the needs of Major League Baseball and society as a whole can be served. These changes would allow for the use of DNA in identity fraud cases, while ensuring that no impermissible uses are occurring.

B. Internal Safeguards for Major League Baseball and Steps Toward Reducing the Need for DNA Testing

GINA provides strict rules for the treatment of genetic information as a medical record, which requires the employer to maintain the information in a personal file for the employee, and also for the limitation on disclosure of such information.¹⁶⁷ GINA demands strict compliance with these rules in the event an employer receives genetic information concerning one of its employees. However, because of the unique structure of Major League Baseball, internal safeguards can be and should be implemented to reduce the temptation to use the genetic information to discriminate based on someone's genetic traits that may be beneficial to Major League Baseball and its individual teams. Currently, both Major League Baseball's Department of Investigation and individual teams are conducting DNA tests.¹⁶⁸ I propose that Major League Baseball centralize this DNA testing within its Department of Investigations. No information regarding the test should be released to the teams other than the ultimate outcome of

¹⁶⁵ See § 202, 122 Stat. at 907-08.

¹⁶⁶ See *id.*

¹⁶⁷ § 206, 122 Stat. at 913-14.

¹⁶⁸ See Schmidt & Schwarz, *supra* note 5 (explaining that individual teams have been conducting DNA tests for years while the League itself has only conducted them for the last year).

whether the player is committing identity fraud. The major financial incentive to discriminate based on the genetic information rests with the individual teams, since these teams provide the salary for the individual players. Major League Baseball has a limited financial stake in individual players; therefore, it would be impartial when conducting the tests.

Furthermore, one of the main problems leading to the identity and age fraud is the role of the *buscon*. Major League Baseball is now discussing means to limit the role of *buscones* in the recruitment of players from the Dominican Republic and thus limit the need for DNA testing.¹⁶⁹ One proposed solution is for Major League Baseball to establish youth leagues to provide access to developmental baseball programs outside of the influence of *buscones*.¹⁷⁰ While this is a good first step, Major League Baseball can accomplish this feat and also revamp the entire recruiting process by including players from the Dominican Republic and Latin America in its First-Year Player Draft. Many commentators have discussed the possibility of implementing a world-wide draft as a possible cure to problems associated with the recruitment of prospects in Latin America.¹⁷¹ I feel that a draft including Latin American players and not the entire world would suffice due to the heavy recruitment of Latin American prospects. Inclusion in the draft will immediately set up more of a Major League Baseball presence in Latin American countries. Player's would have to register for the draft and would have to be at least eighteen years old.¹⁷² The increased presence of Major League teams would mean that prospects would not have to rely on *buscones* for exposure. Furthermore, the increased presence is also a deterrent because of the registration process that will take place for player's to be eligible for the draft. Together with the proposals that Major League Baseball is making regarding recruiting Dominican prospects, a draft could effectively eliminate the role of *buscones* and a major contributing factor to the identity fraud problem.

CONCLUSION

Major League Baseball is attempting to combat a serious age and identity fraud problem. In an effort to combat the problem, Major League Baseball performs DNA tests on prospective players in order

¹⁶⁹ See Schmidt, *supra* note 62 (discussing proposed ideas to reduce the need for genetic testing).

¹⁷⁰ *Id.*

¹⁷¹ Spagnuolo, *supra* note 13, at 282-83; Storms, *supra* note 16, at 92, 96, 99-100.

¹⁷² See Zimmer, *supra* note 12, 419-20.

to confirm their identities. GINA makes this illegal, thus taking away Major League Baseball's most effective tool to combat the fraud. Congress should amend GINA specifically to allow Major League Baseball to continue genetic testing to combat identity fraud. This amendment should allow Major League Baseball to require genetic testing as a condition of employment where it suspects identity fraud on the part of the prospect and grant it the ability to fire or refuse to hire someone if the test reveals fraud. The amendment should also establish a commission to have oversight over Major League Baseball's genetic testing, to which Major League Baseball would have to make periodic reports regarding genetic testing. Furthermore, Major League Baseball should centralize its DNA testing within its Department of Investigations and limit access to the test results so that the results cannot be used in a discriminatory manner. Major League Baseball should also attempt to reduce the need for DNA testing by limiting the role of *buscones* and creating a stronger presence in the Latin American region. They can accomplish this through implementation of its proposal for youth baseball leagues run by Major League Baseball in the Dominican Republic and a draft including players from Latin America.

